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NO. 73-1308

IN THE

Supreme Court of the United States

October Term, 1973

ROBERT I. WHITE, *Petitioner*

v.

UNITED STATES OF AMERICA and
GERALD T. CULVER, *Respondents*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Robert I. White, your Petitioner, (hereinafter sometimes called taxpayer's attorney) prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit in the above case entered November 28, 1973.

OPINION BELOW

The instant case which involves the enforcement of an Internal Revenue Service ("IRS") summons was originally heard in the United States District Court for the Southern District of Texas, Houston Division, during 1971; as a result of the hearing, taxpayer's attorney was ordered to turn certain documents over to the IRS; upon appeal by taxpayer's attorney, the United States Court of Appeals for the Fifth Circuit affirmed with one dissent. (The Fifth

Circuit's first opinion is reported at 477 F.2d 757 and is reproduced as Appendix A, *infra*). Upon petition for rehearing en banc, which was granted, the Fifth Circuit affirmed per curiam with one dissenting and one concurring opinion. (The Fifth Circuit's opinion on petition for rehearing en banc is reported at 487 F.2d 1335 and is reproduced as Appendix B, *infra.*)

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

QUESTIONS PRESENTED

1. Whether lawful possession of alleged incriminating documents is a sufficient basis for invoking the Fifth Amendment self-incrimination privilege as taxpayer's attorney contends or whether both lawful possession and ownership of such documents are required as the Court below held.

2. Assuming that lawful possession is sufficient basis for invoking the privilege, whether taxpayer's attorney's possession is constructively taxpayer's possession for purposes of invoking the privilege. .

3. Whether an IRS summons served prior to the reference of the investigation by the IRS to the Department of Justice for indictment and prosecution may be enforced after indictment while the prosecution of taxpayer is pending.

STATUTORY PROVISIONS INVOLVED

This case involves an Internal Revenue Service summons served under Section 7602 of the Internal Revenue Code of 1954 which is produced in Appendix C, *infra.*

STATEMENT OF THE CASE

During November 1969, a Certified Public Accountant's ("CPA") work papers and files compiled incident to work performed by the CPA for Louis and Carolyn Roberts ("taxpayers") were delivered by the CPA into the lawful indefinite possession of taxpayer's attorney. During December 1970 an IRS criminal investigator (Respondent Gerald Culver) served an IRS summons on taxpayer's attorney demanding production of the CPA's records pertaining to 1962 through 1969. After taxpayer's attorney refused to turn over the documents, a proceeding to enforce the summons was begun in the United States District Court by the United States and Special Agent Culver. Federal jurisdiction was invoked in the trial court pursuant to Section 7604 of the 1954 Internal Revenue Code, 26 U.S.C. 1964 ed., Sec. 7604.

After an evidentiary hearing in the district court, taxpayer's attorney was ordered to turn over to the special agent the CPA's files as they pertained to income tax returns for the years 1966 through 1969. Upon taxpayer's attorney's appeal, the United States Court of Appeals for the Fifth Circuit affirmed (with one dissent) based upon an interpretation of this Court's opinion in *Couch v. United States*, 409 U.S. 322, 93 S.Ct. 611 (1973).

During the pendency of the appeal and before the Fifth Circuit's opinion was published, the IRS investigation of taxpayers terminated and the case was referred to the Department of Justice with a recommendation that Louis Roberts ("taxpayer") be prosecuted. Several days after the Fifth Circuit's opinion was filed, taxpayer was indicted on 11 counts of alleged tax felonies. Taxpayer's case was pending trial when taxpayer's attorney filed a

Motion for Rehearing en banc in the Fifth Circuit which motion was granted. Upon rehearing en banc the Fifth Circuit affirmed per curiam with one dissent and one concurring opinion.

REASONS FOR GRANTING THE WRIT

I.

THE DECISION OF THE COURT OF APPEALS FOR THE FIFTH CIRCUIT IN THE INSTANT CASE IS IN DIRECT CONFLICT WITH THIS COURT'S 1973 DECISION IN *COUCH V. UNITED STATES*; IT IS FURTHER IN DIRECT CONFLICT WITH DECISIONS OF THE COURT OF APPEALS FOR THE NINTH CIRCUIT AND IS APPARENTLY IN CONFLICT WITH A DECISION OF THE COURT OF APPEALS FOR THE THIRD CIRCUIT, ALL OF WHICH RELATE TO A FUNDAMENTAL INTERPRETATION OF THE FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

In *Couch v. United States*, 409 U.S. 322, 93 S.Ct. 611 (1973), Mrs. Couch's records were turned over to her CPA who was assisting her in an investigation being conducted by the IRS. A summons was served upon the CPA requiring production of Mrs. Couch's records. In that case, she argued that as *owner* of the records, she was able to shield the records in the CPA's possession from the IRS pursuant to her Fifth Amendment self-incrimination privilege. In holding that no privilege existed this Court held that possession (not ownership) is the necessary element that must be present before the taxpayer is permitted to claim the self-incrimination privilege; an owner of records out of possession (unless constructive possession of the records exists) cannot shield those

records from an IRS summons. In so holding, this Court stated as follows (93 S.Ct. at 618):

> We do indeed believe that *actual possession* of documents bears the most significant relationship to Fifth Amendment protections against state compulsions upon the individual accused of crime. Yet situations may well arise where *constructive possession* is so clear * * * as to leave the personal compulsions upon the accused substantially intact. (emphasis added)

Both in the majority opinion in *Couch* and in Justice Marshall's dissent, the second issue presented in the instant case was dealt with: that issue assumes that taxpayer's possession of the alleged incriminating documents is a sufficient basis to invoke the self-incrimination privilege and relates to whether taxpayer's attorney's possession of those documents alters the situation. In the majority opinion, the possession by an attorney on behalf of his client was characterized (by reference to *United States v. Judson*) as "conjoined" possession. (93 S.Ct. at 617). Justice Marshall in his dissent dealt with this situation with the following language (93 S.Ct. at 627):

> A transfer to a lawyer is protected, not simply because there is a recognized attorney-client privilege, but also because the ordinary expectation is that the lawyer will not further publicize what he has been given.

In the instant case, the Court of Appeals for the Fifth Circuit has rejected the existence of the Fifth Amendment privilege stating (477 F.2d at 763):

> White's clients, allegedly the object of impermissible governmental compulsion, do not own the work

> papers sought by the government, nor have they ever been in possession of these documents. It is White their attorney who is forced to respond to the governmental summons. . . . The reference to [*Schwimmer v. United States* and *United States v. Guterma*] in *Couch* indicates that a claim for privilege might be valid on the constructive posssession theory if the taxpayer has placed papers in the hands of another person or entity for custodial safekeeping, thereby, retaining the right to immediate possession though not having actual possession. But this conception of constructive possession cannot be extended to fit the situation in which White's clients find themselves. For it is undisputed that they have never for an instant been in possession of the papers sought by the government. White himself obtained the documents from their accountant. . . . At the time the work papers were demanded by the government, they had been in his posession for over a year. In these circumstances a necessary ingredient of personal compulsion against White's client is totally lacking, and in its absence the Fifth Amendment does not prohibit the government from obtaining information vital to the enforcement of its laws and the collection of its revenues.

The principles stated by the Fifth Circuit in the instant case are patently in direct conflict with the principles announced by this Court in *Couch*. The Fifth Circuit's opinion gives no legal efficacy to the attorney-client privilege. Moreover, the opinion requires not only possession but also ownership of the alleged incriminating documents before the self-incrimination privilege can be invoked. In *Couch* this Court implicitly referred to the attorney's and the client's possession of documents as "conjoined" (by reference to *United States v. Judson*, see 93 S.Ct. at 617). Under this rationale, when the attorney is in actual

possession, a client at the same time is in actual possession because the attorney *is* the client for such purposes. Justice Marshall states that documents possessed by an attorney, such as in the instant case, are shielded by the client's privilege. Moreover, this Court held that *possession*, not ownership, of the alleged incriminating documents is the basis for invoking the privilege.

The Fifth Circuit's opinion in the instant case is in direct conflict with the opinions of the United States Court of Appeals for the Ninth Circuit in *United States v. Cohen*, 388 F.2d 464 (1967) and *United States v. Judson*, 322 F.2d 460 (1963). In *Cohen*, a CPA's workpapers pertaining to his client, Cohen, were delivered voluntarily into the indefinite possession of Cohen (the taxpayer involved) who later received an IRS summons demanding production of the CPA's papers. The Court of Appeals for the Ninth Circuit held that the CPA's records, lawfully in the hands of Cohen, are shielded by Cohen's self-incrimination privilege because lawful possession (not ownership) of the records is the criterion. The *Cohen* case directly supports Petitioner's position in the instant case and was referred to by this Court in *Couch* with approval. 93 S.Ct. at 617, n.12. The *Cohen* opinion is thus in direct conflict with the opinion of the Fifth Circuit in the instant case in that the Fifth Circuit requires not only possession but also ownership of the documents.

The Ninth Circuit's *Judson* case is indistinguishable from the facts involved in the instant case. There Judson, the taxpayer's lawyer, had possession of certain records that were the subject of the summons. In *Judson* the Ninth Circuit sustained Judson's invoking the self-incrimination privilege on behalf of his client with respect to

the documents. Thus *Judson* is also in direct conflict with the opinion in the instant case.

The decision in the instant case is apparently in conflict with an opinion of the United States Court of Appeals for the Third Circuit in *United States v. Egenberg*, 443 F.2d 512 (1971). There a CPA was being personally investigated by the IRS and received a summons to produce records in his possession belonging to his clients. The Third Circuit stated that the CPA's records were in the CPA's possession, not in a personal capacity, but rather in a business capacity, and held that the privilege shields only those records in the possession of the CPA in a *personal* rather than a *business* capacity, citing *Boyd v. United States*, 116 U.S. 616, 633 (1886). The *Egenberg* court stated that its conclusions were not inconsistent with the decision of the Ninth Circuit in *Cohen, supra*. Because the Third Circuit does not require ownership (as well as possession) as a prerequisite to invoking the self-incrimination privilege that Circuit's position is apparently in direct conflict with the decision in the instant case.

Another decision in direct conflict with the holding in the instant case is the Tenth Circuit's holding in *United States v. Billingsley*, 469 F.2d 1208, 1210 (1972). In the instant case the Fifth Circuit ordered enforcement of the IRS summons *after* indictment and arraignment. The Tenth Circuit in *Billingsley* held that once a tax case is referred to the Department of Justice for prosecution, no IRS summons may be enforced.

Because of the conflicts between the decision of the Fifth Circuit in the instant case and this Court's *Couch* decision, as well as decisions of the Ninth and Tenth Circuits, a writ of certiorari should be issued to the Fifth Circuit in the instant case.

II.

AN IMPORTANT ISSUE AS TO THE CONSTRUCTION OF SECTION 7602 OF THE INTERNAL REVENUE CODE IS INVOLVED IN THE INSTANT CASE.

The provisions of Section 7602 of the 1954 Internal Revenue Code have been part of the Internal Revenue law since 1864. It was 1964 before this Court construed and explained how the procedures under that section should be conducted.[1] Since then, this Court has decided two cases under Section 7602. *Donaldson* in 1971 (400 U.S. 517) involved whether an IRS summons could be used at all during a criminal investigation and *Couch* in 1973 (409 U.S. 322) involved whether an owner of documents out of possession could claim the self-incrimination privilege.

The instant situation involves the daily recurring situation of an attorney, retained incident to a tax investigation, who has possession of documentary evidence gathered from various sources, including the taxpayer's own records. In states within the Ninth Circuit the attorney's possession of this evidence is viewed as conjoined with the taxpayer's (See *Judson, supra*) and possession of the taxpayer (or his attorney) is all that is necessary to invoke the self-incrimination privilege (see *Cohen, supra*). On the other hand, in states within the Fifth Circuit, the rule apparently is, pursuant to the instant decision, the taxpayer must not only possess but also own the documents involved and he should never surrender physical possession to his attorney. Resolution of this confused

1. *Reisman v. Caplin*, 375 U.S. 440, 84 S.Ct. 508.

situation under Section 7602 is obviously most important.

Because of the conflicts in the construction and application of Section 7602 of the Internal Revenue Code, this Court should issue a writ of certiorai to the Court of Appeals for the Fifth Circuit in the instant case.

III.

THE COURT OF APPEALS FOR THE FIFTH CIRCUIT ERRED IN ORDERING TAXPAYER'S ATTORNEY TO COMPLY WITH THE IRS SUMMONS.

A. The Fifth Circuit Erred in Holding that Taxpayer Must Possess and Own the Documents Before the Self-incrimination Privilege Applies and in Failing to Hold that Documents in Taxpayer's Attorney's Possession are Privileged if They Would Have Been Privileged in Taxpayer's Possession.

Circuit Judge Ainsworth, in his dissent to the first opinion in this case, succinctly states the theme we emphasize as follows (477 F.2d at 767):

> In my view we are seriously weakening the attorney-client relationship and the Fifth Amendment privilege against self-incrimination by what the majority opinion decides in this case. I would accordingly deny the Government the right to production of documents in possession of taxpayers' attorney.

It has long been clear that an individual[2] but not a corporate[3] taxpayer may claim the benefit of the Fifth Amend-

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2. *E.g., Stuart v. United States,* 416 F.2d 459 (C.A. 5th 1969).

3. *E.g., United States v. Bowman,* 435 F.2d 467 (C.A. 3d 1970).

ment's self-incrimination privilege in refusing to turn over documents and make statements to the IRS under a summons. When an individual receives an IRS summons requesting the production of documents, there are four well recognized judicially established principles that come into play:

A. Third party documentary evidence lawfully in the possession of the taxpayer is subject to the self-incrimination privilege because lawful possession (not ownership) of the records is the only requisite to the claim of the Fifth Amendment's self-incrimination privilege. *United States v. Cohen,* 388 F.2d 464 (C.A. 9th 1967).

B. If a third party's documentary evidence is lawfully in the hands of the individual receiving the summons, not in a personal capacity, but rather in a business capacity, then the Fifth Amendment privilege has no application to such evidence, for the privilege shields from governmental inquiry only those records lawfully in the possession of the individual in a personal capacity. *United States v. Egenberg,* 443 F.2d 512 (C.A. 3d 1971); *see also Boyd v. United States,* 119 U.S. 616, 633 (1886).

C. If the third party's documentary evidence has been turned over to the individual receiving the summons (or to that individual's attorney) and the third party-owner of the evidence demands its return, the documentary evidence is unlawfully in the hands of the possessor and because of this unlawful possession the individual cannot shield the records under his Fifth Amendment self-incrimination privilege. *Deck v. United States,* 339 F.2d 739 (C.A.D.C.

1964); *In re Fahey*, 300 F.2d 383, 385 (C.A. 6th 1961).

D. Documentary evidence owned but not in the possession or constructive possession of an individual may not be shielded by that individual from governmental inquiry under the Fifth Amendment privilege because possession is the critical element that must exist before the self-incrimination privilege may be successfully invoked. *Couch v. United States*, 409 U.S. 322, 93 S.Ct. 611 (1973).

In the instant case there can be no doubt that had the CPA's work papers been stored at the taxpayer's home, the self-incrimination privilege would have precluded any production of these papers pursuant to the IRS summons. This is the precise holding of the *United States v. Cohen, supra.* This proposition is confirmed in *Couch.* Why should the taxpayer's attorney's possession change this result, particularly where, as here, the attorney was the taxpayer's agent and attorney-in-fact and received the papers in that capacity. Under both the principles of agency and the attorney-client relationship the attorney's actual possession of the documents is his principal/client's possession. This principle is recognized not only by this Court (*Couch v. United States, supra*) but also by the Court of Appeals for the Ninth Circuit and previous to the instant case, the Fifth Circuit. *United States v. Judson*, 322 F.2d 460 (C.A. 9th 1963); *United States v. Mercurio*, 418 F.2d 1213, 1214 (C.A. 5th 1969). *But see Bouschor v. United States*, 316 F.2d 451 (C.A. 8th 1963).

In the instant case, it is clear that the Fifth Circuit erred in holding that taxpayer must possess *and* own the

documents involved and further erred in failing to hold that documents in taxpayer's attorney's possession are privileged if they would have been privileged in taxpayer's actual possession.

B. The Fifth Circuit Erred in Ordering Enforcement of the IRS Summons After Indictments and Arraignment of Taxpayer.

On August 29, 1972, the IRS referred the investigation of taxpayer to the Department of Justice with a recommendation of prosecution. After the Court of Appeals' first opinion in this case was published, taxpayer was indicted (May 7, 1973) and arraigned (July 20, 1973) and now awaits trial.

The courts have consistently held that an IRS civil summons may not be used for the purpose of obtaining evidence for use in a criminal prosecution. *E.g., Wild v. United States*, 362 F.2d 206 (C.A. 9th 1966); *Boren v. Tucker*, 239 F.2d 767 (C.A. 9th 1956); *United States v. O'Connor*, 118 F. Supp. 248 (D. Mass. 1953). The present status of the law on this point has been stated in two recent decisions of this Court. In *Reisman v. Caplin*, 375 U.S. 440, 449, 84 S.Ct. 508, 513 (1964), the Court stated:

> [The] witness may challenge the summons on any appropriate ground. This would include, as the circuits have held, the defenses that the material is sought for the improper purpose of obtaining evidence for use in a criminal prosecution . . . as well as that it is protected by the attorney-client privilege. . . .

And in *Donaldson v. United States*, the Court in further dictum undertook to clarify the dictum in *Reisman*

as follows (400 U.S. 517, 533, 91 S.Ct. 534, 543-44 (1971)):

> The *Reisman* dictum is to be read in the light of its citation of *Boren*, and of *Boren's* own citation of *O'Connor;* when so read, the dictum comes into proper focus as applicable to the situation of a pending criminal charge or, at most, of *an investigation solely for criminal purposes.* (emphasis added)

Since, today, there is a pending criminal charge it is axiomatic that the summons may not be enforced.

The foregoing rule was adopted by the United States Court of Appeals for the Tenth Circuit in *Billingsley.*[4] The leading case to the contrary is *Weingarden* where the Sixth Circuit held (473 F.2d 454, 461 (1973)) that the validity of a Section 7602 summons is to be determined by the facts at the time of the issuance of the summons. The *Weingarden* standard is pointless. Why should the civil summons be enforced during the pendency of the criminal proceedings?

The fruits of the summons can not be used in the prosecution. And the criminal proceeding will involve numerous evidentiary hearings on motions made to be certain that the government has not illegally utilized the fruits of the summons. A more sensible rule is to quash every summons sought to be enforced during the pendency of the criminal proceeding. At a later date (after the conclusion of the criminal proceeding) the IRS is always free to recommence the summons proceedings. Absent criminal implications the summons would be enforceable and the taxpayer's tax liability can be determined.

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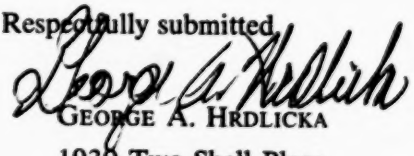
4. *United States v. Billingsley,* 469 F.2d 1208, 1210 (1972).

For the foregoing reasons we submit that the Court of Appeals for the Fifth Circuit erred as a matter of law in ordering taxpayer's attorney to turn over alleged incriminating documents.

CONCLUSION

For the foregoing reasons the petition for writ of certiorari to the United States Court of Appeals for the Fifth Circuit should be granted.

Respectfully submitted,



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February 1974

APPENDIX A

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 71-2381

UNITED STATES OF AMERICA and
GERALD T. CULVER,
Plaintiffs-Appellees,

versus

ROBERT I. WHITE,
Defendant-Appellant.

Appeal from the United States District Court for the Southern District of Texas

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(April 17, 1973)

Before GEWIN, AINSWORTH and SIMPSON, Circuit Judges.

GEWIN, Circuit Judge: In this case we must decide whether the constitutional privilege against compulsory self-incrimination may be invoked in behalf of a taxpayer by his attorney to prevent the production

of income tax workpapers in his attorney's possession. Pursuant to 26 U.S.C. §§ 7402(b) and 7604(a),[1] the government petitioned the United States District Court for the Southern District of Texas for enforcement of an internal revenue summons issued on December 7, 1970 in connection with an investigation of the tax liability of Louis D. and Carolyn R. Roberts for the years 1966 through 1969 inclusive. The summons was addressed to Appellant White, taxpayers' attorney, and directed him to produce workpapers and other documents which had been prepared by taxpayers' accountant and which were then in White's possession. In the enforcement proceeding White asserted his clients' fifth amendment privilege as a bar to the compelled production of the documents in his possession. The district court held that taxpayers had no fifth amendment rights with respect to the papers in their attorney's possession and ordered White to obey the summons. From this order White appeals.[2] We affirm.

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1. § 7402. Jurisdiction of district courts.

(b) to enforce summons. — If any person is summoned under the internal revenue laws to appear, to testify, or to produce books, papers, or other data, the district court of the United States for the district in which such person resides or may be found shall have jurisdiction by appropriate process to compel such attendance, testimony, or production of books, papers, or other data.

§ 7604. Enforcement of summons.

(a) Jurisdiction of district court. — If any person is summoned under the internal revenue laws to appear, to testify, or to produce books, papers, records, or other data, the United States district court for the district in which such person resides or is found shall have jurisdiction by appropriate process to compel such attendance, testimony, or production of books, papers, records, or other data.

2. The district court also denied the taxpayers' request to intervene in the enforcement proceeding in order to protect their interests.

From 1962 through 1968 taxpayers' income tax returns were prepared by Stanley H. Voelkel, a certified public accountant. Voelkel was not taxpayers' personal employee but rather was an independent contractor with his own office and numerous other clients. Using the information supplied to him by taxpayers, Voelkel would compile workpapers and other documents which summarized the data pertinent to the preparation of an income tax return; the information contained in the workpapers would then be used to complete each year's return. After filing a return Voelkel retained his workpapers in his files.

In 1967 taxpayers found it necessary to draft and submit to the Internal Revenue Service an offer in compromise of their tax liability for the years 1962 through 1965.[3] Voelkel assisted them in its preparation, compiling more workpapers in the process. Upon receipt of taxpayers' offer in compromise, the Internal Revenue Service assigned a revenue officer to examine it and to make a recommendation as to its acceptability. The revenue officer apparently found indications that taxpayers did not adequately disclose their assets in making the settlement offer. His discoveries were eventually reported to the Intelligence Division of the Internal Revenue Service which in 1969 assigned a special agent to join him in a thorough investigation of the offer in compromise. Undoubtedly one purpose of this investigation was to determine whether

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Although this ruling may have been erroneous, *compare* Donaldson v. United States, 400 U.S. 517 (1970) *with* Reisman v. Caplin, 375 U.S. 440 (1964), we do not consider it because taxpayers have not appealed.

3. 26 U.S.C. § 7122 (1964 ed.) permits the Internal Revenue Service to accept a settlement in compromise of the tax liability of any taxpayer. Its purpose is to facilitate the settlement of tax liabilities without litigation.

taxpayers had committed criminal violations in making the settlement offer.

When they learned that a special investigation was underway, taxpayers turned to White for counsel; he was officially appointed their attorney and representative-in-fact on a government power of attorney form filed with the Internal Revenue Service. White immediately contacted Voelkel and by November of 1969 had obtained from him not only the workpapers he used in preparing the offer in compromise but also all workpapers used in preparing taxpayers' income tax returns for the years 1962 through 1968. It was agreed that White could keep Voelkel's papers indefinitely but that he would return them upon completion of his representation of taxpayers.

In 1970 taxpayers withdrew their offer in compromise. Shortly thereafter the Internal Revenue Service expanded the scope of its investigation into taxpayers' affairs to include a review of their tax returns for the years 1966 through 1969 in order to determine among other things their correct tax liability for those years. In connection with this expanded investigation the summons in question was issued and served on White.[4] Although the Internal

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4. The summons was issued pursuant to 26 U.S.C. § 7602 (1964 ed.), which provides:

> Examination of Books and Witnesses.
>
> For the purpose of ascertaining the correctness of any return, making a return where none has been made, determining the liability of any person for any internal revenue tax or the liability at law or in equity of any transferee or fiduciary of any person in respect of any internal revenue tax, or collecting any such liability, the Secretary or his delegate is authorized—
>
> (1) To examine any books, papers, records or other data which may be relevant or material to such inquiry;

Revenue Service initially sought all of the workpapers in White's possession, it subsequently modified its demands to encompass only those workpapers used by Voelkel in preparing taxpayers' income tax returns for the years 1965 through 1968. When White refused to produce these workpapers, the government petitioned the district court for enforcement of the summons. At the time enforcement was requested, there had been no recommendation to prosecute either with respect to the tax returns under investigation or with respect to the offer in compromise.

Resolution of this case begins with White's contention that the summons served upon him pursuant to 26 U.S.C. § 7602 is unenforceable because the Service's sole objective in issuing it was to obtain evidence for use in a criminal prosecution of his clients. In *Donaldson v. United States*[5] the Supreme Court refused to hold that a § 7602 internal revenue summons is invalid if issued in aid of a tax investigation which might result in a recommendation that a criminal prosecution be instituted against the taxpayer. The Court rejected a contention similar to White's with these observations:

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(2) To summon the person liable for tax or required to perform the act, or any officer or employee of such person, or any person having possession, custody, or care of books of account containing entries relating to the business of the person liable for tax or required to perform the act, or any other person the Secretary or his delegate may deem proper, to appear before the Secretary or his delegate at a time and place named in the summons and to produce such books, papers, records, or other data, and to give such testimony, under oath, as may be relevant or material to such inquiry; and

(3) To take such testimony of the person concerned under oath, as may be relevant or material to such inquiry.

5. 400 U.S. 517 (1971).

> "Congress clearly has authorized the use of the summons in investigating what may prove to be criminal conduct. . . . There is no statutory suggestion for any meaningful line of distinction, for civil as compared with criminal purposes, at the point of a special agent's appearance. . . . To draw a line where a special agent appears would require the Service, in a situation of suspected but undetermined fraud, to forego either the use of the summons or the potentiality of an ultimate recommendation for prosecution. We refuse to draw that line and thus to stultify enforcement of federal law. . . .
>
> We hold that under § 7602 an internal revenue summons may be issued in aid of an investigation if it is issued in good faith and prior to a recommendation for criminal prosecution."[6]

In view of *Donaldson* it can hardly be disputed that § 7602 permits an internal revenue summons to be issued and enforced in aid of a tax investigation in which civil and criminal purposes are intertwined; the Court cautioned only that the summons must be issued in good faith and prior to a recommendation for criminal prosecution. The record in this case plainly reveals that the summons addressed to White was issued in connection with an investigation the purpose of which, at least in part, was to ascertain the correct income tax liability of taxpayers for the years 1966 through 1969. The trial court conducted an in camera examination of the Service's motives which substantiated the evidence presented in open court. Although the investigation definitely carried with it the possibility of criminal consequences, no recommendation for criminal prosecution had been made either at the time the summons was issued or at the time enforcement was

6. *Id.* at 535-36.

sought. In these circumstances the issuance of the summons was authorized by § 7602.

More substantial problems are raised by appellant's contention that his clients' constitutional privilege against compulsory self-incrimination would be violated if he were compelled to produce the workpapers in his possession. Since taxpayers were denied permission to intervene in the enforcement proceeding, they were unable personally to assert their fifth amendment privilege. Instead White as their attorney asserted it in their behalf. A threshold question, then, is whether attorneys have standing in internal revenue proceedings to assert the privilege in behalf of their clients. This question has been considered by several lower federal courts, and, as is so often the case, conflicting decisions have resulted.

On one hand there is the traditional view that the fifth amendment privilege is purely personal; it does not permit a witness to plead the fact that another party might be incriminated by his testimony even though he is that party's agent or attorney.[7] On the other hand some courts have taken the position that too heavy a burden in terms of time and money would be imposed on taxpayers if they were required to be present personally at internal revenue hearings and enforcement proceedings in order to exercise their constitutional rights.[8] Under this view an attorney does have standing to invoke the privilege in his client's behalf in response to an internal revenue summons

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7. Bouschor v. United States, 316 F.2d 451, 458 (8th Cir. 1963). *Accord* In Re Fahey, 300 F.2d 383, 385 (6th Cir. 1961). Both of these cases rely on language in Hale v. Henkel, 201 U.S. 43, 69-70 (1906).

8. Application of House, 144 F. Supp. 94, 100 (N.D. Cal. 1956). *Accord* United States v. Judson, 322 F.2d 460 (9th Cir. 1963).

that seeks the production of incriminating documents. Assuming, without deciding, that the latter view is correct and therefore that White has standing to asert his clients' privilege, a second question necessarily arises — whether the fifth amendment shields his clients from the compelled production of workpapers owned and prepared by their accountant and held in their atorney's possesion. In order for White to be successful on appeal, this question must be answered in the affirmative; for even he may have standing, it is of no use if his clients have no fifth amendment rights with respect to the papers in his possession.[9]

Like the question of standing, this question has also elicited contradictory responses from the lower federal courts.[10] Fortunately the Supreme Court has provided some guidance with its recent opinion in *Couch v. United States.*[11] The issue presented in *Couch* was whether a taxpayer could successfully invoke her privilege against self-incrimination to prevent the production of incriminating

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9. As an alternative reason for not obeying the summons, White might have argued that the documents were protected by the attorney-client privilege. This argument has been uniformly rejected by the courts on the ground that pre-existing documents such as an accountant's workpapers cannot constitute a confidential communication between the attorney and his client. *See, e.g.,* United States v. Judson, 322 F.2d 460 (9th Cir. 1963). *But see* The Attorney and His Client's Privileges, 74 Yale L.J. 539 (1965).

10. *Compare* Application of House, 144 F. Supp. 94 (N.D. Cal. 1956) *with* Bouschor v. United States, 316 F.2d 451 (8th Cir. 1963). *See also* United States v. Judson, 322 F.2d 460 (9th Cir. 1963); In re Fahey, 300 F.2d 383 (6th Cir. 1961); and United States v. Boccuto, 175 F. Supp. 886 (D. N.J.) *appeal dismissed,* 274 F.2d 860 (3d Cir. 1959).

11. 34 L.Ed.2d 548 (1973). The instant case was argued some time ago, but our decision has been delayed awaiting the decision of the Supreme Court in *Couch.*

documents in her *accountant's* possession. The documents sought by the government were the taxpayer's business records which over the years had been given to her accountant for the purpose of preparing her income tax returns. The taxpayer retained title to the records in herself. As an intervenor in the enforcement proceeding brought against her accountant, she asserted her privilege against self-incrimination as a bar to production of the records.[12]

In rejecting the taxpayer's contention that ownership rather than possesion defines the boundaries of the protection afforded by the fifth amendment, the Court once again emphasized the intimate and personal nature of the privilege. The privilege does not prevent the government from discovering incriminating evidence but rather precludes it from extorting such evidence from the accused himself. Without the essential ingredient of personal compulsion against the accused, a fifth amendment claim necessarily founders. When the government seeks papers which might implicate a taxpayer, the Court concluded that the ingredient of personal compulsion, essential to a claim of privilege, is almost invariably missing unless the papers are actually in the taxpayer's possession. The following remarks are particularly revealing:

> "We do indeed believe that actual possession of documents bears the most significant relationship to fifth amendment protections against state compulsions

12. By the time the government sought enforcement of the summons issued to Couch's accountant, the documents in question had been delivered to Couch's attorney. Nevertheless the Court treated the case as if the documents had remained in the accountant's possession because otherwise the command of a summons could be evaded simply by transferring possession before enforcement is sought. Thus the rights and obligations of the parties involved become fixed when the summons is served, and a transfer cannot alter them.

> upon the individual accused of crime. Yet situations may well arise where constructive possession is so clear or the relinquishment of possession is so temporary and insignificant as to leave the personal compulsions upon the accused substantially intact. But this is not the case before us."[13]

Since it was the taxpayer's accountant rather than taxpayer herself who was actually in possession of the documents sought by the government, she could not legitimately claim that enforcement of the summons would compel her to incriminate herself.[14]

The lesson to be drawn from *Couch*, then, is that unless the taxpayer is actually in possession of documents sought by the government—or clearly has constructive possession —he will be unable to seek the shelter of the fifth amendment because he will not be the object of any impermissible governmental compulsion. White's clients, allegedly the object of impermissible governmental compulsion, do not own the workpapers sought by the government, nor have they ever been in the possession of these documents. It is White their attorney who is forced to respond to the governmental summons. The essence of White's complaint is that potentially incriminating information will be divulged to the government, not that it is being acquired by subjecting the taxpayers to the cruel dilemma of self-accusation, perjury, or contempt. The fifth amendment, however, protects not against the production of such information but only against its extraction from the accused himself.

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13. 34 L.Ed.2d 548, 557 (1973).

14. The Court also held that the Fourth Amendment did not afford the taxpayer any protection against the production of the documents sought by the government.

Appellant's best argument is that taxpayers are in constructive possession of the workpapers because White, the actual possessor, obtained them only in his capacity as taxpayer's attorney and retained them only for the sake of convenience in representing them. In *Couch,* the Court acknowledged the possibility that in a case of constructive possession there might be sufficient governmental compulsion exerted upon the taxpayer to legitimize a claim of privilege. As possible examples of such a case the Court cited *Schwimmer v. United States*[15] and *United States v. Guterma.*[16] In both of these cases a claim of privilege was successfully asserted to prevent the government from obtaining documents the parties had temporarily stored on the premises of corporations. The reference to these cases in *Couch* indicates that a claim of privilege might be valid on the constructive possession theory if the taxpayer has placed papers in the hands of another person or entity for custodial safekeeping, thereby retaining the right to immediate possession though not having actual possession.[17]

But this conception of constructive possession cannot be extended to fit the situation in which White's clients find themselves. For it is undisputed that they have never for an instant been in possession of the papers sought by the government. White himself obtained these documents from

15. 232 F.2d 855 (8th Cir. 1956).

16. 272 F.2d 344 (2d Cir. 1959).

17. In many respects the taxpayer in *Couch* was in a better position to claim constructive possession than is the taxpayer here. In *Couch* the taxpayer herself raised the fifth amendment claim. Furthermore she actually owned the documents sought by the government and had them in her possession at one time. She had relinquished possession of them to her accountant so that he could assist her in preparing her returns. Nevertheless, the possibility that she was in constructive possession by the documents in question was given scant attention by the Court.

their accountant. Although not of controlling importance, there is no evidence in the record that he did so upon their instructions or that they even knew that he had secured them. At the time the workpapers were demanded by the government, they had been in his possession for over a year. In these circumstances the necessary ingredient of personal compulsion against White's clients is totally lacking, and in its absence the fifth amendment does not prohibit the government from obtaining information vital to the enforcement of its laws and the collection of its revenues. The district court correctly ordered enforcement of the summons directed to White insofar as it required him to produce all of the accountant's papers in his possession that pertain to his clients' income tax returns for the years 1966 through 1969.[18] Its judgment is affirmed.

AFFIRMED.

AINSWORTH, Circuit Judge, dissenting:

With deference I dissent because of a strongly held belief that taxpayers' constitutional rights against self-incrimination are being violated by the action taken by the majority in affirming the district court in this case.

On December 7, 1970, Special Agent Gerald T. Culver of the Intelligence Division served an Internal Revenue

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18. There has been some confusion as to what papers the government is seeking confusion that is no doubt exacerbated by the reference in the district court's order to offer in compromise files. For the sake of clarity we refer to the government's brief at page 12:

> We do not know that the workpapers were created to prepare the tax returns, and I think the summons is clear in that we want the workpapers that pertain to the correctness of the tax returns. We do not seek any information with regard to the offer in compromise.

Service summons on Robert I. White, attorney at law, who represented taxpayers, Mr. and Mrs. Roberts, under a written power of attorney filed with the Service, demanding production of certain work papers pertaining to taxpayers' federal income tax returns. These work papers were prepared by taxpayers' accountant and delivered to Mr. White at his request on behalf of his clients.[1] They remained in his possession for approximately a year when the summons was served.[2]

Attorney White declined to produce the papers demanded by the summons and the present enforcement proceeding was begun on February 22, 1971 by the United States and Special Agent Culver for enforcement of the summons, pursuant to 26 U.S.C. §§ 7402(b) and 7604(a).

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1. The accountant, Stanley H. Voelkel, testified as follows:
   Q. Mr. Voelkel, when Mr. White acquired possession of the documents did you know on whose behalf he was acting?
   A. Yes, sir.
   Q. Was it your understanding Mr. White was acquiring those records for himself or on behalf of Mr. Roberts?
   A. On behalf of Mr. Roberts.
   Q. Were you aware of the fact that Mr. White at that time was the attorney representing Mr. Roberts?
   A. I did assume that he was, and it was implied that he represented Mr. Roberts. Otherwise, I wouldn't have given him the files.
   Q. So you turned the files over to Mr. White as Mr. Roberts' attorney?
   A. Yes.
   Q. Was there any specific time limitation on Mr. White's right as Mr. Robert's attorney to keep possession of those records?
   A. Well, he was to return them to me when he finished with them in connection with his representation of Mr. Roberts.
   Q. So that the period of his possession as far as you were concerned was indefinite, is that correct?
   A. Yes.

2. *See generally* Lyon, *Government Power and Citizen Rights in a Tax Investigation*, 25 Tax Lawyer 79 (1971).

A hearing was held before the district court on March 15, 1971, at which time Special Agent Culver testified that he had not reached any conclusions relative to criminal prosecution of taxpayers for violation of federal revenue statutes because he had not completed his investigation. The district court resumed the hearing again on April 5, 1971, and Special Agent Culver further testified: "In my opinion, based on what I know at this point, I think there is a criminal violation involving the offer and compromise and the financial statement that accompanied that offer which was filed by [taxpayer] Mr. Roberts." Mr. Culver then listed several federal criminal statutes apparently violated by taxpayers, namely, 18 U.S.C. § 1001(f), 26 U.S.C. §§ 7206(1) and 7606(5).

While this appeal has been pending, taxpayers' counsel has furnished the court with information to the effect that the Chief of the Intelligence Division of the office of the District Director of the Internal Revenue had written taxpayer, Mr. Roberts, that a recommendation has been made to Regional Counsel to criminally prosecute him for attempted income tax evasion, for making and subscribing false and fraudulent income tax returns, for wilfully attempting to evade payment of income tax, for concealing property with intent to evade or defeat the collection of taxes, for filing a false financial statement, and for making false statements in an offer in compromise. The Government's response is that this information is irrelevant because at the time the summons was issued no recommendation for prosecution had been made.

There is strong reason to believe that the Government was not acting in good faith when it served the instant summons. The case had initially been investigated for some time by an Internal Revenue agent and the Special Agent

of the Intelligence Division was called in later. Even though a recommendation for prosecution had not been made at the time the summons issued, the Service had sufficient information available upon which to base a recommendation. The recommendation should not have been delayed to take advantage of a civil summons. I doubt, therefore, that the requisites of *Donaldson v. United States,* 400 U.S. 517, 536, 91 S.Ct. 534, 545 (1971) have been complied with since the evidence points most strongly to an absence of good faith on the part of the Government, as required by *Donaldson,* in issuing the summons.

Nevertheless, I do not rest my dissent on this ground, but on the more important ground that taxpayers' constitutional rights under the Fifth Amendment against compulsory self-incrimination have been violated. The work papers involved here are documents that would be privileged under the Fifth Amendment if actually possessed by taxpayers when the summons was issued. See *United States v. Cohen,* 9 Cir., 1967, 388 F.2d 464.[3]

In *Cohen* a summons was issued to obtain work papers prepared by taxpayer's accountant and then in taxpayer's possession. The Ninth Circuit maintained taxpayer's Fifth Amendment privilege against self-incrimination and declined to require taxpayer to produce the papers in response to the summons.

In the present case the work papers prepared by taxpayers' accountant from their books and records were not

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3. *But see* United States v. Widelski, 6 Cir., 1971, 452 F.2d 1, 5 (declining to follow *Cohen*), *cert. denied,* 406 U.S. 918, ____S.Ct. ____ (1972). This case was decided before the Supreme Court cited *Cohen* favorably in Couch v. United States, ____U.S.____, ____ n. 12, 93 S.Ct. 611, 617 n. 12 (1973).

in taxpayers' possession but in that of a third person, the attorney at law charged with responsibility of representing them in their federal income tax matters. Attorney White was thus in constructive possession of these work papers on behalf of his clients. During the enforcement proceeding, he claimed the constitutional privilege on behalf of his clients. Then taxpayer, Mr. Roberts, filed a motion for leave to intervene "to claim the benefit of certain constitutional provisions which inured to his benefit," which was denied by the district judge. It is clear, therefore, that Mr. Roberts attempted also to assert his constitutional privilege. However, though the privilege is a personal one, there is no reason why it cannot be asserted in clients' behalf by their attorney at law. *See United States v. Judson,* 9 Cir., 1963, 322 F.2d 460; *In re House,* N.D. Cal. 1956, 144 F.Supp. 95.[4] In *Judson,* an Internal Revenue summons was served on an attorney in possession of clients' papers, demanding production of the documents. The Ninth Circuit maintained the Fifth Amendment privilege asserted by taxpayers' attorney in their behalf. There is no difference in principle between Judson and the present case.

The majority attempts to make a distinction in principle based upon the fact that the work papers in the present case are not owned by taxpayers but belong to taxpayers' accountant who prepared them from taxpayers'

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4. There are cases to the contrary. *See, e.g.,* Bouschor v. United States, 8 Cir., 1963, 316 F.2d 451, 458; In re Fahey, 6 Cir., 1961, 300 F.2d 383. But they rely on dicta from Supreme Court cases where a mere agency relationship existed for the benefit of a public entity which had no Fifth Amendment privilege, such as in Rogers v. United States, 340 U.S. 367, 71 S.Ct. 438 (1951); United States v. White, 322 U.S. 694, 64 S.Ct. 1248 (1944); McAlister v. Henkel, 201 U.S. 90, 26 S.Ct. 385 (1966); and Hale v. Henkel, 201 U.S. 43, 26 S.Ct. 370 (1906).

books and records. However, actual ownership of the documents is not necessary to the assertion of the privilege. *See Couch v. United States,* ____U.S.____, ____ n. 12, 93 S.Ct. 611, 617 n. 12 (1973). The critical question is the right of a possessor rather than that of an owner. In the present case, though the papers are not in the possession of taxpayers, they are in the possession of taxpayers' attorney, and constructively for their benefit.

The majority relies most heavily on the recent Supreme Court decision in *Couch v. United States,* ____ U.S. ____, 93 S.Ct. 611, (1973, where an Internal Revenue Service summons directed to an accountant was challenged by taxpayer based on the Fifth Amendment privilege against self-incrimination. The Court held that the constitutional privilege was not available for documents in possession of the accountant. The case is clearly distinguishable because the accountant-client relationship is essentially different from the attorney-client relationship. There is no expectation of privacy in the accountant-client relationship. On the other hand, the attorney-client relationship is a personal one, guaranteed by the Sixth Amendment right to counsel, the attorney-client privilege,[5] and ethical restraints on the attorney.[6] The attorney-client relationship does not depend on whether the attorney or the client possesses the documents. As Professor Wigmore

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5. *See* Rule 503, Rules of Evidence for United States Courts and Magistrates, 41 L. W. 4021 (U. S. Sup. Ct. Nov. 21, 1972).

6. The new ABA Code of Professional Responsibility in its Ethical Consideration 4-4 notes: "The attorney-client privilege is more limited than the ethical obligation of a lawyer to guard the confidences and secrets of his client. This ethical precept, unlike the evidentiary privilege, exists without regard to the nature or source of information or the fact that others share the knowledge."

concluded: "It follows, then, that *when the client himself would be privileged* from production of the document, either as a party at common law or as a third person claiming title or as exempt from self-incrimination, the attorney having possession of the document is not bound to produce."[7] Moreover, the Ninth Circuit recognized: "The attorney and his client are so identical with respect to the function of the evidence and to the proceedings which call for his production that any distinction is mere sophistry." *United States v. Judson*, 9 Cir., 1963, 322 F.2d 460, 467.[8]

In my view we are seriously weakening the attorney-client relationship and the Fifth Amendment privilege against self-incrimination by what the majority opinion decides in this case. I would accordingly deny the Government the right to production of documents in possession of taxpayers' attorney.

I, therefore, respectfully dissent.

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7. This rule is stated without regard for the path traveled by the documents. No policy would be served by requiring the client first to touch the documents before turning them over to his lawyer. The important fact in this case is that Voelkel gave the documents to White after assurances that he took possession for Roberts. *See also* Comment, *The Attorney and His Client's Privileges*, 74 Yale L.J. 539, 548 (1965) (for an alternative rationale).

8. Justice Marshall in his dissent to *Couch* suggested that the attorney's possession is an example of protected third party custody:

> A transfer to a lawyer is protected, not simply because there is a recognized attorney-client privilege, but also because the ordinary expectation is that the lawyer will not further publicize what he has been given.

____U.S. at____, 93 S.Ct. at 627.

APPENDIX B

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 71-2381

UNITED STATES OF AMERICA and
GERALD T. CULVER,
Plaintiffs-Appellees,

versus

ROBERT I. WHITE,
Defendant-Appellant.

Appeal from the United States District Court for the Southern District of Texas

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ON PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC

(Opinion April 17, 1973, 5 Cir., 1973, ____ F.2d ____).

(November 28, 1973)

Before BROWN, Chief Judge, WISDOM, GEWIN, BELL, THORNBERRY, COLEMAN, GOLDBERG, AINSWORTH, GODBOLD, DYER, SIMPSON, MORGAN, CLARK, RONEY and GEE, Circuit Judges.

PER CURIAM: Upon consideration of the record, briefs and oral argument in this cause en banc, the court concludes that the opinion and judgment of the majority of the panel should be and the same are hereby AFFIRMED.[1]

AINSWORTH, Circuit Judge, dissenting:

There are very important constitutional principles involved in this federal income tax case, which concern the private and confidential relationship of attorney, accountant and client, and pertain especially to the privilege of taxpayers against potential self-incrimination in IRS tax investigations. The action of the majority of the en banc court in affirming the panel opinion requires that I reaffirm my original dissenting views (*see* 477 F.2d 757, 764-767) and expand them further.

The majority has applied erroneous legal standards in enforcing an IRS summons and denying taxpayers' constitutional claim to the Fifth Amendment privilege against self-incrimination, concerning their accountant's workpapers constructively possessed in the hands of taxpayers' attorney. The factual context is briefly stated as

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1. Footnote 18 of the majority panel opinion, 477 F.2d 757 at 764, is rewritten as follows in order to clarify the same and correct typographical errors:

> There has been some confusion as to what papers the government is seeking, which confusion is no doubt exacerbated by the reference in the district court's order to files relating to the offer in compromise. For the sake of clarity we refer to the government's brief at page 12 quoting from the record:
>
> > We do know that the workpapers were created to prepare the tax returns, and I think the summons is clear in that we want the workpapers that pertain to the correctness of the tax returns. We do not seek any information with regard to the offer in compromise.

follows. From information supplied by taxpayers, the accountant prepared certain workpapers pertaining to their income tax liability for the years 1966-68 and to an offer in compromise of income tax liability. When an investigation of taxpayers was begun by Internal Revenue Agents, including a Special Agent of the Intelligence Division, taxpayers' attorney White secured the workpapers from the accountant on behalf of his clients with the understanding that his possession was "indefinite." Shortly more than a year later the Special Agent served an IRS summons (pursuant to 26 U.S.C. § 7602) on attorney White demanding production of the workpapers. White declined to deliver the papers and production was ordered by the district court whose action is now reaffirmed by the majority of the en banc court.

Apparently the principal basis upon which the majority ruled adversely to taxpayers' constitutional claims was that "White's clients, allegedly the object of impermissible governmental compulsion, do not own the workpapers sought by the government, nor have they even been in possession of these documents." 477 F.2d 757, at 763. The majority opinion stressed that the workpapers had been transferred directly from taxpayers' accountant to their attorney without the physical intervention of taxpayers. It pointed out that taxpayers "have never for an instant been in possession of the papers sought by the government." *Id.*

The Government has contended both in its briefs to the panel and to the en banc court that taxpayers may not raise a Fifth Amendment claim against self-incrimination concerning potentially incriminating documents, possessed by them but which *they do not own.* The workpapers here are owned by taxpayers' accountant but were

transferred on indefinite leave to their attorney. In agreeing with the Government's contention relative to the necessity of ownership of the papers, the majority has erroneously declined to follow the teaching of the recent Supreme Court decision in *Couch v. United States*, 409 U.S. 322, 93 S.Ct. 611 (1973), which emphasized that *possession, not ownership,* of potentially incriminating papers is controlling when a taxpayer invokes the Fifth Amendment privilege. In *Couch* the privilege was asserted by a taxpayer as to tax records in the possession of her accountant where they had been for a number of years. The Court granted enforcement of an IRS summons because petitioner Couch, though the owner of the records, was not in actual possession at the time of service of the summons. The Court stated that the Fifth Amendment privilege is a *personal* privilege and that "[i]t is extortion of information from the accused himself that offends our sense of justice." 409 U.S. at 328, 93 S.Ct. at 616. The Court further said:

> "Petitioner would, in effect, have us read *Boyd* to mark *ownership, not possession, as the bounds of the privilege, despite the fact that possession bears the closest relationship to the personal compulsion forbidden by the Fifth Amendment. To tie the privilege against self-incrimination to a concept of ownership would be to draw a meaningless line.* It would hold here that the business records which petitioner actually owned would be protected in the hands of her accountant, while business information communicated to her accountant by letter, conversations in which the accountant took notes, in addition to the accountant's own workpapers and photocopies of petitioner's records, would not be subject to a claim of privilege since title rested in the accountant. Such a holding would thus place unnecessary em-

> phasis on the form of communication to an accountant and the accountant's own working methods, while diverting the inquiry from the basic purposes of the Fifth Amendment's protections.
>
> *"Other precedents debated by the parties lend no support to petitioner's contention that ownership of documents should determine the availability of the privilege."* (Emphasis supplied.) 409 U.S. at 331, 93 S.Ct. at 617.

The Supreme Court in *Couch* also cited with approval the holding of the Ninth Circuit in *Cohen*, as follows:

> "See also *United States v. Cohen*, 388 F.2d 464, 468 (C.A. 9 (1967), where the court, *in upholding the right of a possessor, nonowner to assert the privilege*, noted that 'it is *possession* of papers sought by the government, *not ownership* which sets the stage for exercise of the governmental compulsion which it is the purpose of the privilege to prohibit.' Though the instant case concerns the scope of the privilege for an owner, nonpossessor, the Ninth Circuit's linkage of possession to the purposes served by the privilege was appropriate.
>
> "We do not, of course, decide what qualifies as rightful possession enabling the possessor to assert the privilege." (Emphasis supplied.)
> 409 U.S. at 330 n. 12, 93 S.Ct. at 617 n. 12.

In *United States v. Cohen*, 9 Cir., 1967, 388 F.2d 464, the Government sought production of an accountant's workpapers which had been delivered to his client, Cohen, prior to the service of an IRS summons on the taxpayer. When the Revenue Agent demanded that the accountant ask his client for return of his papers the accountant complied but Cohen declined to return them. The Government contended that Cohen held the papers subject to a

duty to surrender them to the accountant and, therefore, that he could not claim the privilege against self-incrimination. The district and appellate court both disagreed with this contention and declined to order Cohen to produce the accountant's workpapers in his possession.

In its opinion the Ninth Circuit (Browning, J.) said:

> "As the government recognizes, the rule it suggests would make ownership of subpoenaed documents virtually essential to a claim of privilege, for ordinarily only the owner will be able to assert a right to possession superior to all others. But it is possession of papers sought by the government, not ownership, which sets the stage for exercise of the governmental compulsion which it is the purpose of the privilege to prohibit. The 'cruel trilemma' of perjury, contempt, or self-incrimination, of which the Court spoke in Murphy v. Waterfront Comm'n, faces the individual whenever the government seeks to compel him to produce papers in his possession for he must then either falsify, accept punishment for contempt, or yield. Lack of title does not free him from this choice. Possession of potentially incriminating documents is thus the necessary and sufficient condition of the privilege, for the compelled production, identification, and authentication of incriminating materials by the possessor will incriminate him, whether or not the documents are his.
>
> "It is difficult to see how this conclusion could be affected by the fact that the papers were owned by another who had the right to demand their return. The owner's demand would not involve compulsion by the state, and compliance with it would not incriminate the possessor. The considerations upon which the right depends therefore would not apply, even though the documents might thereafter be obtained by the government from the owner. '[T]he

> sentiments which bar the *state* from requiring a person to deliver to it a self-incriminating document are logically unrelated to the fact that someone *else*, using methods and for reasons not giving rise to those same sentiments, can require the person to deliver up the document to that someone else.' 8 Wigmore, Evidence § 2259b, at 360 (McNaughton rev. 1961)." (Footnote with numerous citations omitted.) *Id.* at 468.

The court held that Cohen had rightful possession of the papers since he acquired them with his accountant's full consent. In rejecting the Government's contention that Cohen had no privilege as to nonowned accountant's workpapers, the court said:

> "The government's second contention is that Cohen should be denied the privilege against self-incrimination as to the accountant's work papers because these documents were prepared by the accountant for the latter's own use and therefore 'did not constitute the personal private papers of the privilege-claimant' to which alone the privilege should apply. The 'normal character and nature of an accountant's work papers as third-party documents, vis-a-vis the client' was not changed, the government's contention continues, by the 'eleventh hour' transfer of these documents to Cohen.
>
> "If documents are incriminating, compelled production by the possessor would seem prohibited by the Fifth Amendment for reasons already discussed, without regard to any other characteristic the documents may possess." *Id.* at 470.

The court in *Cohen* further expanded its views on the question of the claim to the privilege as to these documents. It said:

"The government argues that the purpose of the privilege is to prevent the prosecutor from invading the claimant's 'privacies of life' (Boyd v. United States, 116 U.S. 616, 6 S.Ct. 524, 29 L.Ed. 746 (1886)), and to force the government 'to search for independent evidence' of the claimant's guilt (United States v. White, supra, 322 U.S. at 698, 64 S.Ct. 1248). Papers which originated with the accountant and were created by him for his own purposes are not embraced (the argument continues) within the 'privacies' of Cohen's life, but on the contrary, constitute an independent source of evidence of Cohen's offense. The government urges that Cohen should not be permitted to extend the area covered by the privilege or to deny the government access to independent evidence by gathering the documents into his possession after being advised of the government's interest.

"Although the summons issued in this case was sufficiently broad to include books and records which Cohen had delivered to the accountant for his use in the preparation of Cohen's tax returns, the government concedes that the privilege was not lost as to these books and records simply because Cohen reclaimed them so shortly before the summons was served. Thus the government's argument rests ultimately upon the contention that the documents were not sufficiently personal or private in character, rather than upon the contention that the time and manner of Cohen's acquisition of them undermined his claim of privilege.

"Statements in United States v. White, 322 U.S. 694, 64 S.Ct. 1248, 88 L.Ed. 1542 (1944), that the privilege applies to 'personal' or 'private' records do not support the government's position. As this court pointed out in United States v. Judson, 322 F.2d 460, 464 (1963), the Supreme Court intended only to distinguish between records of a natural per-

son which are entitled to Fifth Amendment protection in appropriate circumstances and records of an impersonal organization which are never entitled to such protection. Since the latter are open to inspection by the government at its pleasure, so far as the privilege against self-incrimination is concerned, they may properly be characterized as quasi-public in character. There is nothing in *White* or earlier cases to suggest that the Court intended to base Fifth Amendment consequences upon the degree of privacy which attended the creation or maintenance of particular records or upon the degree of the intimacy of the information which they contain.

"But even if we were to accept the government's test, the claim of privilege would not be barred here. Though prepared by Berke for use by him in the performance of his work, the work papers were scarcely public documents. They embody countless items of information relating to Cohen's purely personal affairs, including itemizations and summaries of data prepared directly from Cohen's bank statements, cancelled checks, and similar records. They were plainly intended for no eyes but those Cohen might designate. To pretend that such papers did not in substance reflect matter personal and private to Cohen, and to treat such papers as a source of information 'independent' of Cohen, would be to condone the very 'shifts and subterfuges' which the government calls upon us to condemn.

"We hold that as a general rule the Fifth Amendment privilege against self-incrimination permits a person in possession of potentially incriminating papers to decline to produce them in response to a summons; that the exception established by the Supreme Court's decision in *Wilson* and *White* is limited to the records of impersonal organizations; and that if any other exceptions exist, based either upon the character of the papers or the nature of

> the claimant's possession, there is none which would bar assertion of the privilege by a claimant who is in possession, with the consent of an accountant, of work papers created by the accountant from information supplied by the person claiming the privilege." *Id.* at 471-472.

The conclusion is, therefore, inescapable that if the accountant's workpapers here were in the possession of taxpayers, who rightfully possessed them, rather than in their attorney's hands, the Fifth Amendment privilege against their production could properly have been asserted.

But the fact that the potentially incriminating documents were in the hands of taxpayers' attorney instead of being in their own possession does not in principle change the nature of the Fifth Amendment privilege, or its availability to taxpayers. Unquestionably attorney White rightfully possessed the workpapers on behalf of his clients and with their consent. They were delivered by the accountant to him at his request more than a year prior to issuance of the IRS summons against White for their production. The papers contained private information, all of which was secured by the accountant from taxpayers in connection with their income tax liability. There was no last-minute shifting of possession of papers. White was a duly qualified attorney for taxpayers under written power of attorney filed with the IRS. He held the workpapers in connection with his representation of taxpayers in the investigation of their income tax. As attorney for taxpayers, he had the same right of possession they had. *Couch* recognized this when the Court said, "[S]ituations may well arise where *constructive possession* is so clear or the relinquishment of possession is so temporary and insignificant as to leave the personal com-

pulsions upon the accused substantially intact." (Emphasis supplied.) 409 U.S. at 333, 93 S.Ct. at 618.[1]

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1. In its brief to the en banc court, the Government cites a number of cases which it contends support its position that workpapers belonging to the accountant are not subject to taxpayers' Fifth Amendment privilege, whether in their possession or their attorney's. Analysis of these cases shows that most of them were decided before the Supreme Court announced in *Couch* the decisive rule of rightful possession rather than ownership as controlling.

A majority of the pre-*Couch* cases cited by the Government are likewise distinguishable on their facts. For example, in United States v. Widelski, 6 Cir., 1971, 452 F.2d 1, though the court expressly disagreed with the Ninth Circuit's holding in United States v. Cohen, *supra,* it ordered production of documents because the facts showed that the Intelligence Division had decided to drop the criminal aspects of the income tax matter and the case then involved only civil tax liability with the possibility of criminal prosecution being remote.

United States v. Egenberg, 3 Cir., 1971, 443 F.2d 512, involved accountant's papers pertaining to his clients' tax returns, but the clients did not object to having the records delivered to the Internal Revenue Service. Here, the accountant, under investigation himself, asserted the Fifth Amendment privilege in his own behalf as to these documents but the court held they were producible because they were business records of his clients and not personal records of the accountant.

In United States v. Zakutansky, 7 Cir., 1968, 401 F.2d 68, the Government sought production of an accountant's workpapers in his possession when the IRS summons was issued and thereafter turned over by the accountant to the taxpayer. The court applied the "rightful possession" test and held that under the circumstances the papers must be returned since they were not in the rightful possession of taxpayer when the IRS summons was served on the accountant. In *Zakutansky* the Seventh Circuit expressly approved the district court holding in United States v. Cohen, 9 Cir., 1967, 388 F.2d 464, and held that if the taxpayer had been in rightful and indefinite possession of his accountant's workpapers, though not owned by taxpayer, the privilege against self-incrimination would have applied. The case strongly supports our position rather than the Government's.

In re Grand Jury Investigation, Isadore H. Bellis, 3 Cir., 1973, _____ F.2d_____ [No. 73-1514, July 9, 1973], a post-*Couch* case, the court affirmed an order for production of documents consisting of partnership records of a law firm of which Bellis was a member, holding that

However, the majority apparently considers that taxpayers' lack of actual possession of the papers is controlling. But taxpayers were in constructive possession of the workpapers through their attorney, White, who possessed them for his clients and claimed the Fifth Amendment constitutional privilege against self-incrimination in their behalf. In *Couch*, the vital relationship was between accountant and client; in the present case, it is between at-

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the partnership had a recognizable juridical existence apart from its members, and, therefore, that production was not an encroachment upon Bellis' personal rights.

In Bouschor v. United States, 8 Cir., 1963, 316 F.2d 451, the accountant's workpapers, ordered to be produced, had already been reviewed by Revenue Agents. Any privilege had thus been waived. The court also held, however, under the circumstances of the case, that an attorney in possession of documents could not assert his client's Fifth Amendment rights against self-incrimination.

In United States v. Cote, 8 Cir., 1972, 456 F.2d 142, the accountant's workpapers sought in possession of taxpayer's attorney had been transcribed onto amended returns which were filed by the taxpayers with the Government. The court held that the privilege had been effectively waived by the previous disclosure of the information.

In Deck v. United States, D.C. Cir., 1964, 339 F.2d 739, the Government obtained production of accountant's papers in possession of taxpayer's attorney but the facts showed that the accountant had demanded their return prior to service of IRS summons and that the attorney refused to return them though they were the accountant's property. Thus the defendant did not have rightful possession.

In re Fahey, 6 Cir., 1961, 300 F.2d 383, the situation was almost the same as that in *Deck, supra*. The accountant demanded return of his papers, and taxpayer and his attorney declined. There was, therefore, no rightful possession by respondents.

In United States v. Weingarden, 6 Cir., 1973, 473 F.2d 454, a post-*Couch* case, the court ordered production of accountant's records (copies of taxpayers' income tax returns) in possession of taxpayers' attorney, holding that taxpayers had no propriety or custodial interest in the records, and they could assert no constitutional protection in them. The case appeared to turn, however, on the issue of whether the sole purpose of the summons was for criminal prosecution. The district court, however, did not consider any question of privilege, nor did the court of appeals.

torney and client. There is no confidential accountant-client privilege under federal law and no state-created privilege has been recognized in federal cases. *Id.*, 409 U.S. at 335, 93 S.Ct. at 619. This is not the case in the attorney-client relationship. *See United States v. Judson*, 9 Cir., 1963, 322 F.2d 460, 462-463; *United States v. Kovel*, 2 Cir., 1961, 296 F.2d 918.

The majority opinion casts doubt upon the right of attorney White to assert the Fifth Amendment privilege on behalf of his clients, though it does not decide this question. *See* 477 F.2d at 761-762. It asserts that there is no evidence in the record that attorney White secured the papers on taxpayers' instructions or that they even knew that he had secured them. 477 F.2d at 763-764. This inference is impermissible under the circumstances. The original record contains taxpayer Roberts' motion to intervene in these proceedings (which was denied), and the proposed petition in intervention. The latter states in part:

> "Intervenor resists the turn over by his agent White of the papers, constructively in Intervenor's possession, on the following grounds:
>
> "A. The papers constructively in Intervenor's possession will or may tend to incriminate Intervenor and pursuant to the Fifth Amendment to the Constitution of the United States, Intervenor has a privilege against self-incrimination, the benefits of which he hereby claims. Possession of the documents in question are sufficient basis for Intervenor's claim of Constitutional privilege. United States v. Cohen, 388 F.2d 464 (C.A. 9th 1967)."

It is recognized that an attorney may claim a Fifth Amendment right against self-incrimination on behalf of

his clients when he is served with an IRS summons, provided his clients may themselves have asserted such a privilege. *See United States v. Judson,* 9 Cir., 1963, 322 F.2d 460, 463-465; *Colton v. United States,* 2 Cir., 1962, 306 F.2d 633, 639, *cert. denied,* 371 U.S. 951, 83 S.Ct. 505 (1963); *Brody v. United States,* 1 Cir., 1957, 243 F.2d 378, 387 n. 5, *cert. denied,* 354 U.S. 923, 77 S.Ct. 1384 (1957). *Contra, Bouschor v. United States,* 8 Cir., 1963, 316 F.2d 451, 458-459.

In *United States v. Judson, supra,* the court upheld an attorney's standing to raise his client's constitutional rights; it quoted with approval the following from Application of House, N. D. Cal., 1956, 144 F. Supp. 95, 100, to that effect, as follows:

> " 'Thus, on the question of the lack of standing of an attorney to raise the claim of privilege for his client although the client does not himself utter the words effectuating the claim, or is not himself physically present, the government cites no convincing authority. The government apparently seeks to establish a novel rule that unless the client himself participates in hearings such as the one held before the agent of the Internal Revenue Bureau, he waives his Constitutional rights. The government could thus put any taxpayer to the choice of attending hearings or investigations, sometimes carried on over considerable periods of time, or waiving his privilege against self-incrimination. Such a rule would accomplish nothing except to impose a heavy penalty in terms of time and money on those taxpayers who chose to assert their right against self-incrimination under the Constitution. The effective exercise of Constitutional rights should not be abridged by any such technical and onerous requirements as that.' " 322 F.2d at 465.
>
> . . . .

The *Judson* court continued:

> "The raw logic of the matter compels us to agree with the court in Application of House, supra. Clearly, if the taxpayer in this case, or in House, had been subpoenaed and directed to produce the documents in question, he could have properly refused. The government concedes this. But instead of closeting himself with his myriad tax data drawn up around him, the taxpayer retained counsel. Quite predictably, in the course of the ensuing attorney-client relationship the pertinent records were turned over to the attorney. The government would have us hold that the taxpayer walked into his attorney's office unquestionably shielded with the Amendment's protection, and walked out with something less. The way was clear, according to appellant, for an enforcement officer to gather up the evidence which otherwise would have been beyond his reach. The taxpayer's only recourse would be the marathon footwork indicated in House." 322 F.2d at 466.

The proper rule in these cases emerges as follows: Rightful possession, actual or constructive, of potentially incriminating documents and papers, is the controlling test for assertion of the Fifth Amendment privilege against self-incrimination. Resolution of this question will depend on the facts determined on a case-by-case basis.[2] An attorney in possession of such papers on behalf of the taxpayer, may assert the privilege on behalf of his client.

The majority decision in this case substantially erodes the constitutional right of a taxpayer, suspected of criminal fraud, to claim Fifth Amendment protection against self-

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2. *Couch* recognized this when the Court said, "We do not, of course, decide what qualifies as rightful possession enabling the possessor to assert the privilege." 409 U.S. at 330 n. 12, 93 S.Ct. at 616 n. 12.

incrimination, impairs his Fourth Amendment right to be free of unreasonable search and seizure, and materially affects his right to counsel guaranteed by the Sixth Amendment.[3] The decision unwittingly helps the Government invade an individual's right of privacy in representation by his attorney and accountant in tax matters.

Regretfully, it is a step in the wrong direction.[4]

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3. Taxpayer Louis D. Roberts has now been charged in an eleven-count indictment with wilful evasion of income tax for the years 1966-69, and with submitting a false offer in compromise pertaining to income tax (United States v. Louis D. Roberts, United States District Court, Southern District of Texas, Cr. No. 73-H-188, May 7, 1973).

4. See an interesting commentary on the majority panel decision herein, in the publication of the American Institute of Certified Public Accountants, *The Tax Adviser*, entitled "The IRS's right of access to the CPA's workpapers and client records," by Edward O. C. Ord, Esq. It reads as follows:

> "Fifth Circuit's White decision. Most recently, a divided Fifth Circuit held a presummons pitchout by the accountant directly to the client's attorney did not permit the client to invoke the self-incrimination privilege.
>
> "White facts. Workpapers (pertaining to the correctness of T's tax returns) were prepared and owned by A, T's independent accountant. A had transferred the workpapers to T's lawyer, L, under an agreement that he could keep them indefinitely but would return them upon completion of his representation of T. No 'recommendation for criminal prosecution' against T had been made either at the time the summons was issued or at the time enforcement was sought.
> "The IRS brought suit to enforce a summons addressed to L in connection with a tax investigation of T. The summons directed L to produce the workpapers. In the enforcement proceeding, L asserted T's Fifth Amendment privilege as a bar to production of the workpapers.
>
> "The District Court ordered enforcement of the summons, reasoning that T had no Fifth Amendment privilege in documents in his attorney's possession.

RONEY, Circuit Judge, concurring:

I concur in affirming the enforcement of the Internal Revenue summons with the understanding that, under

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"The Fifth Circuit also rejected T's claim to the self-incrimination privilege. The Court concluded that there was no possession by the client, and that possession by the attorney did not result in constructive possession by, or a custodial arrangement with, the client. There was an excellent dissent, relying on, among other things, the Ninth Circuit's decision in *Cohen*.

"One wonders if the *White* decision is correct. The basic policy underlying the *Couch* decision is that the taxpayer gives records to a CPA so he can prepare tax returns for the client to file with the Government. Hence, the supporting records are intended to be removed from the client's private sanctuary; therefore, they are available for summons *in the hands of the CPA* since the client cannot assert the Fifth or Fourth Amendment defenses.

"However, when a client gives records to an attorney, especially during a criminal tax investigation, the records are given in confidential manner during an ongoing confidential relationship for the purpose of advising the client of his rights and defending the client from a possible prosecution. One could hardly say the documents are for publication. The relationship is just the opposite in nature from the accountant-client relationship which involves the preparation and filing of an income tax return. Since the reason for the rule in the *Couch* case denying the Fifth Amendment defense is lacking in *White*, it would appear that the rule should not have been applied. The fact that the accountant gave the records directly to the attorney seems to be a transparent distinction.

"It also appears that an unlawful search and seizure defense should be available if a client gives records to an attorney in an income tax investigation for custody with the intent to keep them confidential since the attorney is ethically required to keep this confidence. Therefore, transfer to the attorney could be construed as being within the client's confidential sanctuary; hence, use of the summons constitutes an unlawful search and seizure.

"Finally, the *White* decision may run afoul of the constitutional right of counsel. Can a client be effectively represented by counsel during an income tax investigation if he gives the attorney records, or has his accountant do so, to study or evaluate at the client's peril? At a minimum, it puts a severe strain on attorney-client communications and advice during an income tax investigation. . . ."

the circumstances of this case, even the taxpayer could have been compelled to produce the workpapers owned and prepared by his accountant. If the Fifth Amendment would shield the taxpayer, were the papers in his possession, then I would hold that a combination of the attorney-client privilege and the Fifth Amendment would shield the same papers from compelled production when in the attorney's possession. Thus, I would not put the attorney in the shoes of the accountant, under *Couch,* but would put him in the shoes of his client, and uphold the historic and important attorney-client relationship by permitting the attorney to assert the taxpayer's constitutional privilege against compulsory self-incrimination. In this case, of course, where the taxpayer was not protected, there is no privilege to assert. It is my understanding that the panel opinion is not contrary to this view.

APPENDIX C

INTERNAL REVENUE CODE OF 1954 (26 U.S.C.):

Sec. 7602. Examination of Books and Witnesses.

For the purpose of ascertaining the correctness of any return, making a return where none has been made, determining the liability of any person for any internal revenue tax or the liability at law or in equity of any transferee or fiduciary of any person in respect of any internal revenue tax, or collecting any such liability, the Secretary or his delegate is authorized—

(1) To examine any books, papers, records, or other data which may be relevant or material to such inquiry;

(2) To summon the person liable for tax or required to perform the act, or any officer or employee of such person, or any person having possession, custody, or care of books of account containing entries relating to the business of the person liable for tax or required to perform the act, or any other person the Secretary or his delegate may deem proper, to appear before the Secretary or his delegate at a time and place named in the summons and to produce such books, papers, records, or other data, and to give such testimony, under oath, as may be relevant or material to such inquiry; and

(3) To take such testimony of the person concerned, under oath, as may be relevant or material to such inquiry.